PECD Bhd & Anor v Merino-ODD Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D9(D2)–336 OF 2008
AZAHAR MOHAMED J
3 MARCH 2009

Civil Procedure — Ex parte application — Non-disclosure of material facts — Full and frank disclosure of all relevant matters — Failure to disclose material facts — Non-disclosure of dismissal of extension of first restraining order — Whether material fact — Whether particulars should have been disclosed in present proceedings — Whether failure to disclose material facts within knowledge of party would result in setting aside ex parte order obtained

Companies and Corporations — Restraining order — Setting aside — Ex parte order including scheme of arrangement — Whether monies to be distributed to scheme creditors raised for specific purpose — Whether monies raised were trust monies

PECD Bhd and PECD Construction Sdn Bhd, the first and second applicants were two ailing companies, insolvent or, at least, on the verge of insolvency. The applicants applied by way of an ex parte originating summons for leave to convene a creditors' meeting to consider a scheme of arrangement ('the first scheme') and for a restraining order of 90 days under s 176(10) of the Companies Act 1965 ('the Act'), which was dismissed. On appeal the Court of Appeal allowed the appeal and the restraining order ('the first RO') was granted for 60 days. However, the applicants' application to extend the first RO by another 30 days was dismissed. The applicants appealed to the Court of Appeal but the appeal was also dismissed. Therefore, by way of a fresh ex parte originating summons ('the present proceedings') the applicants applied for leave to convene a creditors' meeting to consider the scheme and a fresh restraining order for 90 days. The learned judge granted the application. All the interveners strenuously and vigorously opposed the scheme and applied to set aside the ex parte order, on four general grounds. The third intervener contended that RM30m should not be utilised to fund the scheme for the reason that these were monies held on trust by the first applicant in favour of the third intervener. Further, all the interveners contended that the scheme was mala fide and maintained that there were material non-disclosures on the part of the applicants when obtaining the ex parte order. The interveners also stated that the applicants were hopelessly insolvent.

Held, allowing the application and setting aside the ex parte order:

(1) RM30m was raised for a very specific purpose, namely for the partial redemption of certain notes and should have been paid to the third intervener as trustee for the noteholders. The RM30m was raised from the shareholders of a public listed company pursuant to legislation, namely the Capital Markets and Services Act 2007 ('CMSA') (see paras 14–15).

(2) Thus, the RM30m could not be distributed to the scheme creditors under the scheme. It was against public policy to sanction such a scheme. It was not a feasible scheme which was capable of being presented to the scheme creditors of the applicants. The RM30m proceeds received by the first applicant from the rights issue exercise were expressly for the purpose of paying the third intervener and were therefore monies held on trust by the first applicant in favour of the third intervener as the sole or exclusive beneficiary of the same (see paras 17 & 24).

(3) Further, the present scheme was based substantially on the first scheme, which was the subject matter and put forth before the learned judge in the first originating summons. However, all orders from the first originating summons were material facts and particulars which should have been disclosed in the present proceedings. The applicants however, had failed to disclose these material facts which will result in the court setting aside the ex parte order obtained (see para 26).

[Bahasa Malaysia summary

PECD Bhd & PECD Construction Sdn Bhd, pemohon pertama dan kedua merupakan dua buah syarikat yang sedang merosot, yang tak solven atau, sekurang-kurangnya, hampir-hampir ke peringkat ketaksolvenan. Pemohon-pemohon telah memohon melalui saman pemula ex parte untuk kebenaran mengadakan mesyuarat pemiutang bagi mempertimbangkan satu skim penyusunan ('skim pertama') dan untuk satu perintah halangan selama 90 hari di bawah s 176(10) Akta Syarikat 1965 ('Akta'), yang mana telah ditolak. Semasa rayuan, Mahkamah Rayuan telah membenarkan rayuan dan perintah halangan ('PH pertama') diberikan untuk tempoh 60 hari. Walau bagaimanapun, permohonan pemohon-pemohon bagi melanjutkan PH pertama untuk tempoh 30 hari lagi telah ditolak. Pemohon-pemohon merayu kepada Mahkamah Rayuan tetapi rayuan tersebut juga telah ditolak. Oleh itu, melalui saman pemula ex parte yang baru ('prosiding sekarang') pemohon-pemohon memohon kebenaran mengadakan mesyuarat pemiutang bagi mempertimbangkan skim dan perintah halangan yang baru untuk 90 hari. Hakim yang bijaksana telah membenarkan permohonan tersebut. Kesemua pencelah dengan keras dan lantang menentang skim tersebut dan

memohon untuk mengetepikan perintah ex parte, atas empat alasan am. Pencelah ketiga mengatakan bahawa RM30j tidak boleh digunakan bagi menampung skim atas sebab wang tersebut dipegang sebagai amanah oleh pemohon pertama bagi pihak pencelah ketiga. Selanjutnya, kesemua pencelah mengatakan bahawa skim adalah mala fide dan mempertahankan bahawa terdapat ketakdedahan yang material di pihak pemohon-pemohon setelah mendapat perintah ex parte. Pencelah-pencelah juga menyatakan bahawa pemohon-pemohon tidak mampu membuat bayaran.

Diputuskan, membenarkan permohonan dan mengetepikan perintah ex parte:

(1) RM30j diwujudkan bagi satu-satunya tujuan khusus, iaitu sebagai penebusan sebahagian daripada nota-nota tertentu dan sepatutnya dibayar kepada pencelah ketiga sebagai pemegang amanah bagi pemegang-pemegang nota. RM30j diperoleh daripada pemegang-pemegang saham syarikat senaraian awam menurut undang-undang, iaitu Akta Pasaran Modal dan Perkhidmatan 2007 (APMP) (lihat perenggan 14–15).

(2) Oleh itu, RM30j tidak boleh dibahagikan kepada pemiutang-pemiutang skim di bawah skim tersebut. Ia adalah bertentangan dengan polisi awam jika skim tersebut dipersetujui. Ia bukanlah skim yang boleh diterima yang boleh dibentangkan kepada skim pemiutang-pemiutang pemohon-pemohon. Hasil RM30j yang diterima oleh pemohon pertama daripada amalan pengeluaran hak adalah secara jelasnya untuk tujuan membayar pencelah ketiga dan oleh itu wang-wang yang dipegang secara amanah oleh pemohon pertama bagi pihak pencelah ketiga sebagai satu-satunya benefisiari eksklusif bagi perkara sama (lihat perenggan 17 & 24).

(3) Selanjutnya, skim sekarang adalah sebahagian besarnya berdasarkan kepada skim pertama, yang merupakan perkara pokok dan dibawa di hadapan hakim yang bijaksana dalam saman pemula yang pertama. Walau bagaimanapun, semua perintah-perintah daripada saman pemula pertama adalah fakta-fakta dan butiran-butiran material, yang seharusnya didedahkan dalam prosiding sekarang. Walau bagaimanapun pemohon-pemohon, gagal mendedahkan fakta-fakta material ini yang menyebabkan mahkamah mengetepikan perintah ex parte yang telah diperolehi (lihat perenggan 26).]

Notes

For a case on non-disclosure of material facts, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2653.

For a case on setting aside restraining order, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 735.

Cases referred to

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, HL (refd)

Castle Inn Sdn Bhd v Bumiputra-Commerce Bhd [2009] 1 MLJ 542, CA (refd)

Clements Langford Pty Ltd, Re [1961] VR 453 (refd)

Cooper v PRG Powerhouse Ltd [2008] EWHC 498, Ch D (refd)

Hasmah bt Abdul Rahman v Kenny Chua Kien Lam [2006] 5 MLJ 236, CA (refd)

Industrial & General Insurance Company Limited and others v AON Group Limited [2003] EWHC 240, QBD (refd)

Jin Lin Wood Industries Sdn Bhd v Mulpha International Bhd [2005] MLJU 326; [2005] 7 CLJ 208, HC (refd)

K Rees Emporium Ltd, Re [1969] VR 981 (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316, CA (refd)

Kuala Lumpur Industries Bhd, Re [1990] 2 MLJ 180, HC (refd)

Malaysia Discounts Bhd v Pesaka Astana (M) Sdn Bhd [2008] 5 MLJ 1; [2008] 5 CLJ 130, CA (refd)

Metroplex Bhd & Ors v Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (interveners) [2005] 6 MLJ 487, HC (refd)

Mun Loong-Hankyu Jaya Sdn Bhd & 5 Ors, Re [1999] 4 AMR 4438, HC (refd)

PB Securities Sdn Bhd v Autoways Holding Bhd [2000] 4 MLJ 417, CA (refd)

Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97, CA (refd)

Pelangi Airways Sdn Bhd v Mayban Trustee Bhd [2001] 2 MLJ 237; [2001] 6 CLJ 129, HC (refd)

Playcorp v Venture Stores 7 ACSR 193 (refd)

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1990] 2 MLJ 31; [1989] 1 LNS 145, HC (refd)

Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2) [1993] 2 MLJ 353, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007
Companies Act 1965 s 176, 176(1), (3), (10)
Rules of the High Court 1980 O 29 r 2A

Azhar Azizan Harun (Abdullah Abdul Rahman with him) (Cheang & Ariff) for the applicants.
Shanthi Supramaniam (Belden) for the first intervener.
M Menon (Jaffar & Menon) for the second intervener.
Yoong Sin Man (Lau Kee Sern with her) (Shook Lin & Bok) for the third intervener.

Azahar Mohamed J:

[1] PECD Bhd (the first applicant) and PECD Construction Sdn Bhd (the second applicant) are two ailing companies. The applicants are insolvent or, at least, on the verge of insolvency. The first applicant, a public limited company is the holding company of the second applicant. Bursa Malaysia has announced its intention to delist the first applicant. According to the balance sheet of the first applicant as at the financial end 31 December 2007, the shareholders' fund stand at approximately negative RM908,210,930,596 with total liabilities of RM1,011,300,596. And based on the balance sheet of the second applicant as at the financial end 31 December 2007, the shareholders' fund stand at approximately negative RM853,783,131 with total liabilities of RM1,520,298,656.

[2] As a result of this state of affairs, both the applicants had on 13 August 2008, filed an ex-parte application and obtained the following orders on 18 August 2008:

(i) meetings of certain creditors of the applicants (the scheme creditors) were ordered to be convened pursuant to s 176(1) of the Companies Act 1965 (the Act) within 90 days from the date thereof to consider a scheme of arrangement dated 22 October 2008 (the scheme) proposed by the applicants; and

(ii) a restraining order pursuant to s 176(10) of the Act (the restraining order) on all legal proceedings against the applicants for a period of 90 days from the date of the order.

[3] Against this backdrop three enclosures, came up for hearing before me. The applications of Merino-ODD Sdn Bhd (the first intervener), Affin Bank Bhd (the second intervener) and AmTrustee (the third intervener) are to be found in encl 19, encl 30 and encl 34 respectively.

[4] At this point, it is important to take a closer look at s 176(1) and s 176(10) of the Act. Now pursuant to s 176(1), it is provided that where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class

of them the court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the court directs. Further s 176(10) provides that where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the court and subject to such terms as the court imposes.

[5] My view as to the workings of this statutory remedy is as follows: Where a company in financial difficulties proposes to compromise or enter into an arrangement with its creditors there are three stages to be undertaken under s 176 of the Act. In the first place upon an application by an originating summons, the court will summon a meeting of the scheme creditors to consider the proposed scheme. Secondly, the scheme creditors will then vote on the proposed scheme. Lastly, if the scheme creditors approve the proposed scheme with the requisite statutory majority, the court will then sanction the scheme upon a separate application by the applicant (s 176(3)). At any stage before or after an application for a court convened meeting under s 176(1) is made, the court may grant a restraining order under s 176(10) (see *Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 18). The purposes of a restraining order under s 176(10) are: (i) to protect the assets of the company pending the possible adoption of the scheme (see *Playcorp v Venture Stores* 7 ACSR 193); (ii) to allow the scheme creditors to properly consider the scheme without extraneous considerations; and (iii) to prevent the implementation of the scheme from being frustrated especially by legal suits (see *Re Clements Langford Pty Ltd* [1961] VR 453; *Jin Lin Wood Industries Sdn Bhd v Mulpha International Bhd* [2005] MLJU 326; [2005] 7 CLJ 208). It is essential to bear in mind that the power to order a court convened meeting is derived from s 176(1) of the Act only when there is a scheme of arrangement being proposed. The court must have before it a bona fide proposal of a scheme of compromise or arrangement that is feasible and merits due consideration by the scheme creditors (see *Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180 and *Re K Rees Emporium Ltd* [1969] VR 981). Both s 176(1) and s 176(10) require the applications to be dealt with in a summary way which means the applications are dealt by way of ex parte before a judge in chambers (see *Re Kuala Lumpur Industries*, *Jin Lin Wood Industries Sdn Bhd*, *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31; [1989] 1 LNS 145, *Pelangi Airways Sdn Bhd v Mayban Trustee Bhd* [2001] 2 MLJ 237; [2001] 6 CLJ 129 and *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417). These two sub-sections of s 176 may be brought independent

of the other; it is not such that a s 176(10) application has to be tagged on to a s 176(1) application (see *Re Kuala Lumpur Industries Bhd*). An ex parte application is only apt for exceptional cases of valid urgency. Since the applications are dealt with ex parte and in a summary manner, it is essential that there must be a frank and fair disclosure of all relevant materials including points that may be unfavorable to the applicant, so that if the relief is granted, it would rightly be granted. The court will require strict compliance of this requirement.

[6] Coming back, then, to the present case; I think it is convenient that I should deal with all the three enclosures at the same time. All the three interveners have been given leave to intervene in these proceedings. Based on their applications, the third intervener has applied for the whole of the ex parte order dated 18 August 2008 to be set aside. The first intervener and the second intervener have applied for the restraining order to be set aside. In addition, the first intervener is also applying that as an alternative to setting aside the restraining order, the first intervener is to be excluded from the scheme. On the other hand, the second intervener is also seeking to be excluded from the scheme. In furtherance, the second intervener is also asking for the sum of RM7.5m to be paid into an escrow account and to be frozen.

[7] There are four general grounds upon which the interveners have grounded their applications. In the first place, the third intervener said that the RM30m should not be utilised to fund the scheme for the reason that these are monies held on trust by the first applicant in favour of the third intervener. Secondly, all the interveners have contended that the scheme is mala fide. Thirdly, all the interveners have maintained material non-disclosures on the part of the applicants when obtaining the ex parte order. Lastly, the interveners have stated that the applicants are hopelessly insolvent.

[8] To appreciate the arguments raised by all the parties, it is necessary to set out the concise background and sequence of relevant events leading to the applications in encl 19, encl 30 and encl 34. On 5 March 2008 the applicants applied by way of an ex parte Originating Summons No D1–24–63 of 2008 (the first OS) for leave to convene a creditors' meeting to consider a scheme of arrangement (the first scheme) and for a restraining order of 90 days under s 176(10) of the Act. However, on 24 April 2008 the learned judge dismissed the first OS. Thereafter, the applicants appealed to the Court of Appeal against that decision. On 9 May 2008 the Court of Appeal allowed the appeal and a restraining order (the first RO) was granted for 60 days. Next, on 3 July 2008 the applicants applied to the learned judge to extend the first RO by another 30 days from 9 July 2008. On 14 July 2008 the learned judge

dismissed the applicants' application to extend the first RO. The applicants appealed to the Court of Appeal but the appeal was dismissed. Therefore, the first RO was not extended. Then on 13 August 2008 an important event happened; by way of a fresh ex parte Originating Summons No D2–24–336 of 2008 (the present proceedings) the applicants applied for leave to convene a creditors' meeting to consider the scheme and a fresh restraining order for 90 days. And as stated earlier, the learned judge granted the order on 18 August 2008. It is this order which is now the subject matter of encl 19, encl 30 and encl 34.

[9] The scheme can be found at exh A-19 at encl 1B (the first applicant's supporting affidavit). All the interveners strenuously and vigorously opposed the scheme. In this regard learned counsel for the applicants argued that the matters raised by the interveners ought to be addressed at the sanction stage under s 176(3) of the Act which says that if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the court, be binding on all the creditors or class of creditors or on the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

[10] In my view, based on *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1990] 2 MLJ 31, *Metroplex Bhd & Ors v Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (interveners)* [2005] 6 MLJ 487, *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353, this court at this stage can evaluate and consider whether the scheme between the applicants and its scheme creditors is viable and feasible, thereby capable of being presented to the scheme creditors to be voted upon. In *Sri Hartamas* case Siti Norma Yaakob J (as she then was) said:

> The court must now give a critical eye as to whether the scheme is a viable one so as to conciliate the relations between the applicant and its three classes of creditors for the common benefit of the same classes of creditors to whom the scheme is intended to be addressed …
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> I accept the fact that this court is not equipped to inquire into the practical implications of the scheme but nevertheless by virtue of s 176(4) of the Act, which gives me the discretion not only to order a creditors' meeting under sub-s (1) but also to refuse to make an order for such a meeting, I consider that I can evaluate and consider whether the scheme is reasonable and fair so as to benefit all three classes of creditors based on the information disclosed by the applicant as to the framework of the scheme itself. For that purpose I shall now consider the

significant features of the scheme and their legal aspects and to determine whether they offend any principles of law that negative the exercise of my discretion to order the creditors' meetings in the first place …

The other objection raised is that the applicant is hopelessly insolvent and that it is against public policy to sanction any scheme that it proposes to undertake. The test of the insolvency of any company must be viewed in the commercial sense, that is, its inability to meet current demands irrespective of whether the company is possessed of assets, which if realised, would enable it to discharge its liability in full, see the cases of *Re Sunshine Securities (Pte) Ltd* [1978] 1 MLJ 57, *Malayan Plant (Pte) Ltd v Moscow Norodny Bank Ltd* [1980] 2 MLJ 53 and *Re Hong Huat Realty (M) Sdn Bhd* [1987] 2 MLJ 502.

I have already detailed the extent of the applicant's liabilities and the fact that it owns lands, the potential value of which need to be tapped by developing them into a housing and commercial estate does not make the applicant any less insolvent. It was in circumstances somewhat similar in the case of *Re Buildmat (Australia) Ltd* (1983) 1 ACLC 919; (1983) 7 ACLR 944 that the Supreme Court of New South Wales had to consider whether to order a creditors' meeting to approve a proposal to be undertaken by a company that was hopelessly insolvent. In refusing to make the order, the court held that it is against public policy to approve any scheme to be undertaken by an insolvent company as to order otherwise would amount to the court 'condoning or encouraging persons in our commercial community to carry on business activities in a company which was handicapped by a heavy burden of indebtedness and thereby unable to pay debts in full at any given time'. The court also held that in exercising its discretion, the court is not only concerned with the interests of the creditors themselves but also with its duty to uphold the commercial morality of the country. Under such circumstances, even if the creditors were to approve the scheme, the court would not do so. In this respect, the applicant's contention that regardless of its insolvency, an opportunity be given for it to present the scheme to the creditors so that they can object to it, if they wish to, cannot carry any weight as the demands of public policy far outweigh any plea of an opportunity to be heard on the scheme before the creditors …

In addition, it is not disputed that being hopelessly insolvent, it is against public policy to approve a scheme to be undertaken by an insolvent company even though the creditors may come to approve the scheme if it is presented to them. In this case, if the scheme is implemented, the applicant will be left to carry on business but with liabilities well in excess of $299m with no realisable assets whatsoever as the lands would naturally be charged to the financiers to secure the $40m credit facilities. These two matters alone justify my holding that there is no bona fide attempt to conciliate the relations between the applicant and respondent for the common benefit of the other creditors to whom the scheme is also intended to be addressed.

[11] Having regard to the factual situation of the present case and based on the facts as presented, in my view, the complaints raised by the interveners ought not be left at the sanction stage under s 176(3) of the Act.

[12] It is important to keep in mind that under the scheme proposed by the applicants, cash payments of RM40m will be paid to the three categories of the scheme creditors of the applicants. This cash payment of RM40m is a very critical component of the scheme, without which the scheme is bound to fail. I observe that the applicants in obtaining the ex parte order of 18 August 2008 did not in their supporting affidavits sufficiently identify and draw attention to this key point of the scheme. The scheme hinges upon the availability of the sum. It is not disputed that the fate of the scheme depends on the availability of RM40m to be distributed to the scheme creditors.

[13] Now the source of the fund of RM40m is not through fresh injection of capital or the entry of the so-called 'white knight' to facilitate the survival of the applicants. The source of the purported fund comes in this manner. In June 2007, the applicants announced its plan to undertake a renounceable rights issue together with free detachable warrants on the basis of two rights issue with one free detachable warrant for every two existing ordinary shares held. This exercise was part of their overall turnaround initiatives announced in October 2007, and was completed on 30 November 2007, raising RM104,168,256 through the issuance of 208,336.512 new shares. The surplus of the rights issue exercise as at 30 June 2008 is RM40,076,000 and under the scheme it is this surplus cash payment of RM40m will be paid to the scheme creditors of the applicants.

[14] The important point which requires to be kept in mind that cannot be overlooked is that out of the sum of RM40m raised through the right issue exercise, RM30m of the proceed from the rights issue was raised for a very specific purpose, namely for the partial redemption of certain notes and was to have been paid to the third intervener as trustee for the noteholders. I think I need to explain about these notes. On 14 October 2004 a *murabahah* notes issuance facility agreement was executed by PECD Jaya Holdings Sdn Bhd (formerly known as Peremba Jaya Holdings Sdn Bhd) ('the issuer') to issue certain notes of up to RM200m to various noteholders ('investors'). On 14 October 2004, the third intervener acts as trustee for the noteholders in relation to the notes, pursuant to the trust deed of 14 October 2004 and as amended by a supplemental trust deed dated 17 October 2005. The issuer defaulted in payments under the notes which led to the third intervener and noteholders considering legal action to be taken. The first applicant and holding company of the issuer, requested indulgence in respect of the issuer's default and in consideration thereof, agreed to pay to the third intervener RM30m from the first applicant's rights issue exercise. On 1 August 2007 a letter of undertaking was issued by the first applicant to the third intervener that a sum of RM30m from the proceeds received from its rights issue exercise will be paid to the third intervener towards payment of moneys owing under the notes and that such payment will be made not later than

seven days after the date of receipt by the first applicant of such proceeds from the rights issue. On 26 September 2007, the securities commission ('SC') approved the first applicant's right issue exercise including the utilisation of the rights issue monies, of which RM30m was to be paid to part-settle the notes. As required by law, the first applicant issued circular to its shareholders on rights issue. In it, it was expressly stated that from proceeds of rights issue raised from the shareholders, RM30m will be paid for part-settlement of the notes. On 10 October 2007, the first applicant's shareholders approved the first applicant's right issue exercise and subscribed to such rights issue shares. On 30 November 2007, the rights shares was granted listing and quoted on the Bursa Malaysia. On 11 January 2008, the first applicant after receiving the rights issue proceeds, refused to pay the sum of RM30m to the third intervener. On 5 May 2008 a letter of protest was issued by the trustee to the SC on the first applicant's refusal to pay the RM30m. On 8 May 2008 a letter of demand was issued to the first applicant for payment of the RM30m.

[15] On that note, the point to make here is this. The RM30m was raised from the shareholders of a public listed company pursuant to legislation, namely the Capital Markets and Services Act 2007 ('CMSA'). I think it is imperative that I repeat here that the proceed from the rights issue (RM30m) was raised for a very restricted and exclusive purpose, namely for the partial redemption of the notes and was to have been paid to the third intervener as trustee for the noteholders. Two points should now be made. The first is that the legislation ensures that it is incumbent on the first applicant to provide relevant and accurate disclosure of all material information for its shareholders to evaluate the merits of their investments. A disclosure-based regulatory framework involves a full and accurate disclosure of all relevant information that would enable shareholders to make informed investment decision and therefore appropriate standard of disclosure must be complied with. And the second is that the RM30m was raised from shareholders of a public listed company and the first applicant could only have been allowed to do so provided the purposes for which the rights issue proceeds are raised are rigorously met. The market activities of the first applicant should not be carried out in a way that is in conflict with the provisions of the CMSA.

[16] In my view, there is merit in the arguments of learned counsel for the third intervener that if the first applicant were to utilise the RM30m contrary to the object for which the same was raised, the first applicant would have misled and misrepresented the intention of its funds raising exercise to its shareholders, the public and the SC concerning the rights issue exercise. When looked in this way, one can see that any utilisation of RM30m contrary to the purpose for which the same was raised would contravene the provisions of the CMSA, which might attract penal sanction. It is an offence under the CMSA if the terms and conditions of the SC for rights issue are not met. It

is also an offence if false or misleading statements are made to the SC. In addition, the CMSA also provides that it is an offence if abridged prospectus for rights issue contains misleading information. No judgment of this court will be intended to aid any contravention of law. This court will not compromise on shareholder protection and market integrity. This is required and vital in order to instill confidence among investors of the integrity of our capital market and the economic sector of our country. In this connection, the authority that I would like to refer is the case of *Hasmah bt Abdul Rahman v Kenny Chua Kien Lam* [2006] 5 MLJ 236. In that case, the respondent was the managing director of the company and an attempt was made to float the company on the second board of the then Kuala Lumpur Stock Exchange (the KLSE), whereby the respondent was required to comply with several requirements by the SC, the KLSE and other relevant statutory provisions. There was a purported sale of the shares in the company by the respondent to the appellant and subsequently, a dispute arose as to whether such sale was genuine. The Court of Appeal refused to find for the respondent as he had practised a deception on the authorities. At p 242, the court said:

> The reason for finding illegality was not one of statutory illegality but that 'Bank Negara, a public authority, had been deceived and that the primary object of the entire exercise was to practise such deception. The court accepted the legal principle postulated in the case of *Suntoso Jacob v Kong Miao Ming* [1986] 2 MLJ 170 which held that where …
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> Hence, in our view the purported sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end.' There was indeed a deception practised on the relevant approving bodies which were part and [parcel of the public administration on this country. Indeed, the respondent had come to seek for assistance from the court with unclean hands. The transaction was therefore tainted with illegality right from the start and thus unenforceable.

[17] Thus, in my view, the RM30m could not be distributed to the scheme creditors under the scheme. To my mind, it is against public policy to sanction such a scheme. It is not a feasible scheme which is capable of being presented to the scheme creditors of the applicants.

[18] The further ground upon which the third intervener has grounded its application in encl 34 is that the RM30m that the first applicant undertook in its letter of undertaking dated 1 August 2007 to pay the MUNIF noteholders from the first applicant's rights issue of RM40m are monies held on trust by the first applicant and may not be distributed under the scheme. In this regard, learned counsel for the applicants argued that in respect of the RM30m proceeds from the rights issue there is no common intention to create a trust and that the language used does not give rise to a trust.

According to him the circular to the shareholders of the first applicant and a prospectus to the prospective subscriber of the rights issue merely set out the proposed utilisation of proceeds. He further argued that there is no special arrangement for the creation of trust. He argued there is no arrangement for the RM30m to be refunded to the subscribers if it is not paid to the third intervener and there is also no arrangement for the RM30m to be put in a special account. As a final point he emphasised that in the circumstances, no trust has been created in respect of the RM30m.

[19] However, it is my view that there is more merit in the submission of learned counsel for the third intervener that the monies raised by the first applicant are trust monies. In *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at p 580 it was held that:

> That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years.
>
> The basis for the decision was thus clearly stated, viz, that the money advanced for the specific purpose did not become part of the bankrupt's estate.

[20] Our Court of Appeal in *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97 at p 107 said:

> This is called a 'Quistclose' trust, taking its name from the leading case on the point, *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. In those circumstances, if the money had been used for some purpose other than the purchase of Fimaly shares, that would amount to a breach of trust by Raja Zainal. This would entitle the plaintiffs to trace the money into the product of breach of trust. And, if the first defendant (confining myself to the present facts) dishonestly assisted Raja Zainal in the breach, then it would be liable as a fiduciary with a duty to account for the trust money.

[21] Also our Court of Appeal in *Malaysia Discounts Bhd v Pesaka Astana (M) Sdn Bhd* [2008] 5 MLJ 1; [2008] 5 CLJ 130 (at p 158) held that as the issuer of bonds had undertaken that proceeds from government contracts will be utilised to settle that bonds, the trustee for the bondholders had a proprietary claim to such monies.

[22] Further on this point, in *Cooper v PRG Powerhouse Ltd* [2008] EWHC 498 the court observed that:

> It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract. As North J explained in *Gibert v Gonard* (1884) 54 LJ Ch 439,

> 440: 'It is very well known law that if one person makes a payment to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose.' …
>
> If not express there was clearly to be implied into the arrangement that neither Mr Cooper nor the Company regarded the amount of the payment as part of the assets of the company at its 'free disposal' and available, in particular, as working capital or for payment of its creditors.

[23] Finally, in *Industrial & General Insurance Company Limited and others v AON Group Limited* [2003] EWHC 240 the court said:

> In my view the same conclusion follows where a person pays money to another for the specific purpose of settling his liability to various creditors, because he retains an interest in the money until it is applied for its purpose. However, a different conclusion would follow where the person who paid the money did not envisage that any of it would come back to him. In that case the payee would either obtain the whole of the legal and beneficial interest in the money, ie it would be a payment to him outright, or he would hold it in trust for third parties and perhaps himself as well.

[24] In my view the RM30m proceeds received by the first applicant from the rights issue exercise were expressly for the purpose of paying the third intervener and are therefore monies held on trust by the first applicant in favour of the third intervener as the sole or exclusive beneficiary of the same.

[25] Now I come to a different point. Learned counsel for the first and the second interveners argued that the applicants in obtaining the ex parte order of 18 August 2008 failed to disclose certain material facts, namely the applicants' application to extend the first RO was refused by the learned judge in the first OS and that the Court of Appeal dismissed the applicants' appeal against the dismissal of the extension of the first RO.

[26] Now, how much detail should the affidavit contain? The affidavit in support of an ex parte application must, inter alia, contain a clear statement of any facts known to the applicants which might lead the court not to grant relief ex parte and of whether any previous similar ex parte application has been made to any other judge, and if so, the order made in that previous application (see as an illustration the mandatory requirement under O 29 r 2A of the Rules of the High Court 1980; *Malaysian High Court Practice*, (Abridged Edition) Malayan Law Journal, 1999, paras 29.1.15–29.1.17). It is vital to disclose any point which might be favorable to the other parties to take it if they were present at the ex parte application. Where there is doubt

as to whether a fact is material or otherwise, I think it is better to disclose it. Whilst I observe that the applicants in their affidavit in support of the ex parte application of 13 August 2008 did mention about the first RO of 60 days dated 9 May 2008 granted by the Court of Appeal, the crucial point that require to be kept in mind is that the applicants elected not to disclose the decision of the learned judge dismissing the application to extend the first RO and the decision of the Court of Appeal dismissing the applicants' appeal against the dismissal of the extension of the first RO. In this regard, it must be emphasised that the present scheme is based substantially on the first scheme, which was the subject matter and put forth before the learned judge in the first OS. Given this, in my view, all orders emanated from the first OS by the learned judge including the dismissal of the application for extension of the first RO and the subsequent dismissal of the appeal by the Court of Appeal against that decision are material facts and particulars which should have been disclosed in the present proceedings.

[27] What is the effect? As stated earlier, when a party makes an ex-parte application to the court of any kind, he must make a full and frank disclosure of all relevant matters. It as an established principle of law where there is a failure to disclose material facts within the knowledge of a party in an ex parte application, this will result in the court setting aside the ex parte order obtained. In *Castle Inn Sdn Bhd v Bumiputra-Commerce Bhd* [2009] 1 MLJ 542 our Court of Appeal said:

> It is an established general rule of law that when a party makes an ex parte application to the court of any kind, he must make a full and frank disclosure of all relevant matters. This general rule applies in particular to an ex parte application for extension of the validity of a writ; and an extension can be refused on this ground alone: per Lord Brandon of Oakbrook, speaking for the House of Lords in *Baly & Anor*.
>
> In, *The King v The Special Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond De Polignac* [1917] 1 KB 486, at p 509, Warrington CJ held, inter alia, as perfectly well settled that a person who makes an ex parte application to the court ie in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by reason of the order which has thus wrongly been obtained by him.
>
> Within our shores, in *Creative Finishing Sdn Bhd v Wong Koi @ Wong Khoon Foh d/a Syarikat Sri Jaya* [1989] 2 CLJ 93, at p 96 (SC), Mohd Azmi SCJ (as he then was) explained that:
>
> (i) in presenting affidavit evidence for an ex parte order, it is incumbent upon an applicant to make full and frank disclosure of all material facts;

(ii) every material representation must not be misleading, and there must not be any suppression of material facts; and

(iii) failure to do so at the crucial time of making the ex parte application would variably be fatal.

A similar sentiment was shown by Steve Shim J (later CJ (Sabah and Sarawak)) in *Yeoh Kee Aun*, at p 514 to the effect that where there is a failure to disclose material facts within his knowledge in an ex parte application by a party or where there is any material misrepresentation, it will result in the court setting aside the ex parte order obtained.

I would respectfully add that the raison d'tere, for the aforesaid established general rule of law, is that an ex parte application is an application *uberrimae fidei* ie of the utmost good faith and the court has to rely on the unilateral version of the applicant who must candidly and faithfully tell the truth, the whole truth and nothing but the truth. Anything short of that utmost good faith will invariably render the ex parte application fundamentally flawed and on that ground alone, result in the inevitable setting aside of the ex parte order so obtained.

(See also, *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316; *Re Mun Loong-Hankyu Jaya Sdn Bhd & 5 Ors* [1999] 4 AMR 4438). This is the principle which I would act upon in the present case. In my view the applicants had failed to disclose material facts concerning the refusal by the learned judge and the Court of Appeal in the first OS to extend the first RO.

[28] As a consequence, based on all the aforesaid reasons, I would set aside the ex parte ordered obtained on 18 August 2008. Accordingly, I make an order in terms of encl 19 paras 2 and 5; encl 30 paras 1 and 2; and encl 34 paras, c and d.

Application allowed. Ex parte order set aside.

Reported by Ashgar Ali Ali Mohamed